



Supreme Court of the United States

October 19, 1943 Term

No.

MITCHELL IRRIGATION DISTRICT,
a Corporation,

Petitioner,

vs.

JOHN A. WHITING, JR., Water Commissioner,
District 14, Division 1, State of Wyoming,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

SUMMARY OF ARGUMENT

Petitioner owns an adjudicated water right from the North Platte River, an interstate stream, acquired prior to Wyoming Statehood, with point of diversion in Wyoming, used exclusively for irrigation of land in Nebraska.

The law of priority obtains in both Wyoming and Nebraska and water is diverted in both states under adjudicated appropriations obtained by compliance with laws of the respective states or, prior to statehood, by compliance with territorial law, for beneficial use.

The diversion and taking of water for beneficial use in each state is controlled exclusively by state administration officials who are required to perform their duties in compliance with law.

From date petitioner acquired its appropriation, its right to divert and take for beneficial use in the irrigation of its Nebraska lands the amount of water appropriated under its priority date was, prior to August 1, 1940, always recognized; and petitioner used water diverted under its

appropriation continuously from June 20, 1890 to August 1, 1940, without interference from junior appropriators in Wyoming.

Since August 1, 1940, Wyoming officials have intentionally refused to enforce the law of priority to protect petitioner from unlawful diversion by appropriators in Wyoming whose appropriations are junior in priority to petitioner's priority.

Petitioner seeks the aid of this Court against the wrongful, unlawful, intentional, and arbitrary acts of the Wyoming officials which acts have resulted in substantial injury to the petitioner and if permitted to continue will destroy a substantial property of petitioner protected under the Federal Constitution.

II

AUTHORITIES AND ARGUMENT

A Water Right Constitutes a Property Right

A water right, acquired under Wyoming law, has been held by decisions of the Supreme Court of Wyoming to constitute private property, and that the priority of a water right is the most valuable element of such property has been likewise judicially recognized. The record in this case, free from any contradiction, shows conclusively that not only has petitioner a water right, constituting a valuable property right with a priority senior in time to those whom the respondent has continually permitted to divert water in disregard of petitioner's right, but that petitioner's water right was acquired before Wyoming became a state, on July 10, 1890, and shows that all appropriators junior to petitioner, diverting from the North Platte River in Wyoming, above petitioner's point of diversion, acquired their rights with knowledge of, and subject to the prior right of petitioner to at all times, when needed and available, use the water of the North Platte River to the extent of its appropriation, before any one of them could legally divert a single cubic foot of water from the common source of supply, but the judgment, entered in the case at bar, ignores entirely petitioner's priority right.

See: Art. 8, Sec. 3, Constitution of Wyoming, Appendix B, page 25.

- Hereford Ranch v. Packing Co., 33 Wyo. 14, 236 P. 764.
Hunt v. City of Laramie, 26 Wyo. 160, 181 P. 137.
Whalon v. Canal Co., 11 Wyo. 313, 71 P. 995.
Kinney on Irrigation & Water Rights, 2d Ed., Vol. 2, Sec. 768.
Long on Irrigation, 2d Ed., Ch. 7, pp. 293-94.
Wiel on Water Rights in Western States, Vol. 1, 3d Ed., Sec. 308, page 326.
Hinderlider v. La Plata River and Cherry Creek Ditch Co., 304 U. S. 92, 82 L. Ed. 1202.

Official Status of a Wyoming Water Commissioner

Wyoming water commissioners have been many times held by the Wyoming Supreme Court to be executive officers charged with performing only ministerial duties, and exercising only police power, with no authority to question the existence or status of any water right, whether it be an adjudicated right or merely a permit, their duty being to regulate and control within the area to which they are assigned, the diversion and taking for beneficial use of appropriated water, strictly in conformity to priority of right.

See: Sec. 122-303, 304, W. R. S. 1931, Appendix C, pp. 25-6.

- Laramie Irrigation & Power Co. v. Grant, Water Commissioner, 44 Wyo. 392, 13 P. (2d) 235.
Ryan v. Tutty, 13 Wyo. 122, 78 P. 661.
Hamp v. State, 19 Wyo. 377, 118 P. 653.
Parshall, State Engr. v. Cowper, 22 Wyo. 385, 143 P. 302.
Van Buskirk v. Live Stock Co., 24 Wyo. 183, 156 P. 1122.
Farm Investment Co. v. Carpenter, et al., 9 Wyo. 110, 61 P. 258.

And the Wyoming Court so found in Conclusions of Law No. 1, (R. 49), and Conclusions of Law No. 7, (R. 40).

Respondent water commissioner's disregard of the law of priority in dividing, regulating, and controlling the diversion and taking of appropriated water in accordance with decree priorities when the supply was insufficient to meet all needs was unlawful.

The following authorities illustrate how uniformly the law of priority has been enforced and generally recognized under varying conditions, and showing how utterly erroneous is the judgment entered in the case at bar.

See: Clark, et al. v. Ashley, et al., 82 P. 588.

Lower Latham Ditch Co. v. London Irrigation Canal Co., et al., 60 P. 629.

Alamosa Creek Canal Co., et al. v. Nelson, et al., 93 P. 1112.

Rodgers v. Nevada Canal Co., 151 P. 923.

Platte Valley Irr. Co. v. Buckers Irr. Co., et al., 53 P. 334.

Hufner, et al. v. Sawday, et al., 94 P. 424.

Comstock, et al. v. Ft. Morgan Res. & Irr. Co., 151 P. 929.

Union Mill & Mining Co. v. Dangberg, et al., 81 Fed. 73.

Priority of Water Right on Non-Navigable Interstate Stream

In the supervision and control of the diversion and taking of appropriated water for beneficial use from a non-navigable interstate stream, the priority rights of individual appropriators having acquired appropriations under the laws of different states, receive the same recognition as if all appropriations from such stream were made by compliance with laws of a single state. State lines do not affect such rights in states where the law of priority obtains.

Water rights on interstate streams have been by all courts protected by the enforcement of the priority doctrine, the same as rights local to the jurisdiction of a single state; see Wiel, Vol. 1, Page 364, Sec. 343; Kinney on Irrigation & Water Rights, 2d Ed., Vol. 3, Page 2975, including the decisions of the Supreme Court of Wyoming, Sec. 1629, where the decisions on the question are reviewed.

The only interstate feature of petitioner's water right is the fact that the water diverted under its adjudicated Wyoming territorial appropriation is diverted in Wyoming, and conveyed in an interstate canal into the State of Nebraska,

where the diverted water is applied to beneficial use in the irrigation of Nebraska lands.

The following authorities sustain petitioner's right to be protected in times of insufficient water supply to satisfy all needs:

Willey, et al. v. Decker, et al., 11 Wyo. 496, 73 P. 210.

Morris v. Bean, 123 Fed. 618, affirmed 221 U. S. 485, 55 L. Ed. 821.

Taylor v. Hulett, et al., 97 P. 37.

Conant, et al. v. Deep Creek & Curlew Valley Irr. Co., 66 P. 188.

Weiland v. Pioneer Irrigation Co., 238 Fed. 519, affirmed 259 U. S. 498, 66 L. Ed. 1027.

Miller & Lux v. Rickey, et al., 123 Fed. 604, affirmed 218 U. S. 258, 54 L. Ed. 1032.

Howell v. Johnson, et al., 89 Fed. 556.

Anderson, et al. v. Bassman, et al., 140 Fed. 14.

Hoge v. Eaton, 135 Fed. 411.

Adjudicated Water Rights Subject to State Supervision

The petitioner's water right was acquired by compliance with Wyoming Territorial Law and adjudicated by Wyoming State Board of Control, under order dated the 2nd day of October, 1920. Pursuant to the order of the Nebraska Supreme Court in the case of Sorensen, Attorney General v. Mitchell Irrigation District, petitioner had its water right adjudicated by the Nebraska State Board of Roads and Irrigation under order dated the 27th day of November, 1940, an official body clothed with authority to adjudicate water rights. All water rights, both in Wyoming and Nebraska, on the North Platte River that have any connection with the issues had been duly adjudicated, prior to the commencement of petitioner's suit, both the rights referred to in petitioner's petition and the additional rights referred to in the decision of the Supreme Court of Wyoming.

The adjudication of a water right, under either Wyoming law or Nebraska law, means that a board, court, or tribunal duly authorized, shall consider the application of an appropriator and hear the evidence offered in support thereof, and if the same is found to be sufficient enter its order or decree fixing the date of priority of the appropriation, designating the stream from which the supply is to

be taken, the point at which the diversion is to occur, the volume which the appropriator is entitled to divert, and the beneficial use to be made thereof.

As to all water rights on the North Platte River, both in Nebraska and Wyoming, that have any material connection with this action, such an order of adjudication had been duly entered before petitioner's suit was instituted, so that notwithstanding the statement in the decision of the Wyoming Supreme Court that rights of junior appropriators in Wyoming must be considered and that such appropriators should have their day in court before the relief prayed for by petitioner could be granted, there was no issue to be adjudicated or litigated between the petitioner and any other appropriator on the North Platte River. The official orders of adjudication of all these Wyoming junior appropriations were all officially recorded, none of them were questioned in any manner by petitioner, to the contrary their status as determined by the order of adjudication was throughout the litigation unqualifiedly admitted. This being so, with the further fact that the administration of the appropriated waters of the North Platte River in Wyoming by statute has been reserved to the State and by statute exclusively placed with a water commissioner, a state administrative official of the district in which the diversion is made, and that in times of insufficient water supply no appropriator can interfere with the commissioner's regulation of diversions in the area in which he has jurisdiction, there was no need to bring in other parties in order to litigate the single issue between the petitioner and the Wyoming official as to whether or not the law of priority would be enforced, or whether junior appropriators in Wyoming, in direct violation of Article 8, Section 3 of the Constitution of Wyoming, and Sections 122-303 and 304 of W. R. S., 1931, should be permitted to divert from the available quantity when insufficient to fill all legal demands made thereon in disregard of the petitioner's senior priority. There was no other issue presented or raised by the pleadings, and there was no other issue for the Wyoming Courts to decide.

The result of the decision of the Wyoming Supreme Court makes it very definite and certain that petitioner's water right will be totally destroyed. This result inescapably follows such decision since the North Platte River is an over-appropriated stream. There is not at this time, and there never will be in the future, an opportunity to obtain

water by appropriation, and should protection of petitioner's priority be now denied in this Court, the destruction of its water right follows because it can obtain no relief from any other source. The Wyoming Supreme Court in its opinion forewarned petitioner not ever to make further effort before it to protect its water right priority as it would be subject to a plea of laches. See Opinion, 136 P. (2d), (Rec. 194) even though petitioner had enjoyed the unmolested full use of its water right, including priority, for more than half a century and commenced its action to protect same within less than six months after learning of the purpose of Wyoming state officials to refuse recognition thereof in the future.

The evidence in the case is free from any conflict and conclusively establishes that during the period from August 1, 1940, to the end of the irrigation season, September 30th, through the willful discriminatory conduct of the respondent water commissioner, water appropriators having points of diversion in Wyoming in the same jurisdictional area where petitioner diverts, but above its point of the diversion, were permitted to divert continuously, day after day, in the most critical period of the irrigation season, a very substantial quantity of water in excess of 100 cubic feet per second of time, all taken under appropriations junior in time and junior in right to petitioner's appropriation, and that the water so taken, or a substantial part thereof, would have been available, for use by the petitioner, had those unlawful diversions been prohibited. And the evidence likewise shows an intention by Wyoming in the future to disregard petitioner's vested property right and permit the destruction thereof for the benefit of appropriators who make use of the water diverted from North Platte River for irrigation of lands located in Wyoming. See Respondent's Statement, Rec. 86, 116-117.

Section 122-303, W. R. S., 1931, see Appendix C, page 25-6, first adopted as Section 42 of Chapter 8 of the Laws of Wyoming, approved December 22, 1890, had been continually since that date construed to the effect that no distinction should be recognized between appropriators of water in Wyoming for beneficial use in irrigation of lands within Wyoming and appropriators of water in Wyoming for beneficial use in irrigation of lands situated in another state, where the diversions were made from an interstate stream. Not until the decision pronounced in the case at

bar had Wyoming statutes and Constitutional provisions been otherwise construed or interpreted by a Wyoming Court with reference to the duties of a state water official until the decree rendered herein departed from that construction. In the opinion of the Supreme Court in the case at bar for the first time that statute has been erroneously and arbitrarily construed as applying to lands in the State of Wyoming only; and while not specifically so stating, the decision appealed from in the case at bar is in direct conflict with the law as pronounced in *Wyoming v. Colorado*, 259 U. S. 419, 66 L. Ed. 999, and *Weiland v. Pioneer Irrigation Co.*, 238 Fed. 519, affirmed 259 U. S. 498, 66 L. Ed. 1027, and the Wyoming cases of *Willey, et al. v. Decker, et al.*, reported in 11 Wyo. 496, 73 P. 210, decided August 3, 1903, and *Farm Investment Co. v. Carptener, et al.*, 9 Wyo. 110, 61 P. 258, which sustain every contention of petitioner herein.

III

NECESSARY PARTIES

The Wyoming Court dismissed petitioner's suit on the sole ground that certain parties not before the Court were indispensable.

These parties are named in Conclusion of Law No. 11, (Rec. 41). They include Wyoming appropriators whose adjudicated water rights were found to be junior in priority to petitioner's, see Conclusion of Fact, No. 17, (Rec. 37); and Nebraska appropriators whose water rights were found to be senior in priority to that of petitioner, see Conclusion of Fact, No. 18, (R. 37).

The presence of necessary parties to enable the Court to proceed without prejudicing the rights of persons not parties to the suit was not raised by the pleadings, in the briefs or in oral argument before the trial court, being first mentioned in the trial court's conclusions of fact and conclusions of law. As a basis therefor the Court relied on Section 89-521 W. R. S., 1931, see appendix C, page 26.

In the Wyoming case of *Binning v. Miller, et al.*, 55 Wyo. 478, 102 P. (2d) 64, the Wyoming Supreme Court construed that statute as to the duty of a trial court where all interested parties were not before the Court, and remanded the case with directions that those parties whose interest were involved be called in or be given an oppor-

tunity to voluntarily come in and then if they did not appear the action should be dismissed. That is far different from the disposition made of the case at bar. There are no substantive conflicting property rights to be determined in this case as in the Binning case. The only issue being the protection of a vested property right from being invaded, interfered with, and destroyed by unlawful acts of the respondent. The Wyoming Court in dismissing petitioner's suit without prejudice, viewed in the light of the established facts, says, in effect, to the petitioner, you are in a predicament, even though you have an established vested property right and have shown that Wyoming officials are intentionally destroying that right and have stated their intention to continue such conduct. The Wyoming Courts will not protect your right.

The construction of the above statute was also before the Wyoming Supreme Court in an earlier case, *Kirch v. Nicholson*, 42 Wyo. 489, 297 P. 398; and the construction there pronounced was not followed in the case at bar. Nor did the Wyoming Court follow the principle stated by the U. S. Supreme Court in *Elmendorf v. Taylor, et al.*, 10 Wheat. (U. S.) 150, 6 L. Ed. 289.

There is in the case at bar a single issue, namely, to require the lawful performance of official administrative duties by a Wyoming official within the State of Wyoming for the protection of property rights in Wyoming but owned by a citizen of Nebraska.

Neither the junior Wyoming appropriators nor the Nebraska senior appropriators could possibly be indispensable or even necessary parties. Their several rights to divert water had all been judicially established and the decrees of adjudication were not in question. Bringing the Wyoming junior appropriators into the case certainly could not have changed the date of their priority nor the volume of water which they were entitled to divert, nor the beneficial use for which the appropriation was granted, nor the point of diversion. None of these were in question. Their decrees of adjudication were all final, binding upon not only petitioner but upon the Wyoming Courts. See *Hinderlider v. La Plata River and Cherry Creek Ditch Co.*, 304 U. S. 92, 82 L. Ed. 1202. If any question could become a proper subject of judicial inquiry as to the relative rights of petitioner and any other appropriator on the North Platte River, the relief prayed for by petitioner, if granted, would not bar

such inquiry and respondent would not be either a necessary, proper, or indispensable party to such inquiry.

Aside from the fact that the Wyoming Courts could not acquire jurisdiction over the Nebraska senior appropriators, the decrees of the Nebraska appropriations were not questioned. A decree protecting petitioner's vested right from continued invasion by the respondent could under no circumstances disturb the rights of either junior or senior appropriators. A decree requiring respondent to perform his ministerial duties in a lawful manner should be beneficial to all appropriators and their presence as parties was not essential. The Court found in Conclusion of Law No. 2, (Rec. 39), it is the duty of respondent to divide, regulate, and control the diversion and taking of appropriated water from the North Platte River channel under adjudicated water rights within said Division No. 1, District No. 14, in strict priority order at all times when the quantity available is insufficient to meet all demands made upon the respondent under adjudicated appropriations diverting in that area.

The question may properly be asked, how could the extent or character of the duty to be performed by respondent be changed in any way if others be made parties to the suit?

The proceedings against the respondent were strictly in personam to protect petitioner's property right from the injurious result of unlawful acts and wrongful conduct of a Wyoming administrative official, only a police officer.

That the respondent was exclusively in control of the diversion and taking of appropriated water in the water division and district in question is not a subject for investigation. It was so alleged by petitioner, (Rec. 3), and admitted by respondent, (Rec. 11).

The Wyoming Supreme Court in the case of Irrigation Company v. La Porte, 26 Wyo. 522, 188 P. 360, considered a similar question and stated as follows:

"The petition in this case alleged that no one except Nina A. La Porte had any claim upon the security of the bond sued upon, and the judgment of the Natrona county district court adjudged costs to her alone. Under these circumstances it would have been useless to have brought the other named obligees on the bond into the case."

The bringing of other parties in as plaintiffs or defendants would be useless.

In the Wyoming case, *Laramie Irrigation & Power Co. v. Grant, Water Commissioner*, 44 Wyo. 392, 13 P. (2d) 235, the suit was commenced by the Power Company against Grant in his capacity as Water Commissioner, occupying a position identical with respondent herein. An injunction was granted to restrain him from alleged wrongful acts in regulating head gates on streams in the district under his authority. The order upon review, was vacated but not upon the ground that the trial court was without jurisdiction to grant the same because of defect of parties.

IV

WATER SUPPLY

Respondent contended that there was a quantity of water passing petitioner's head gate continuously during the months of August and September 1940, (Rec. 86), from which supply petitioner could have relieved its need by raising its head gate and taking the volume needed into its canal.

The evidence shows that the water passing petitioner's head gate during the months of August and September 1940 was appropriated water all ear-marked to satisfy demands of senior appropriators diverting below petitioner's head gate. (Rec. 99).

Respondent testified that there was sufficient water available but petitioner neglected to take it, (Rec. 85), but admitted that his statement was based upon a refusal by him to consider any demands below petitioner's head gate in the State of Nebraska, (Rec. 116), that he made his statement in disregard of all demands of senior appropriators in Nebraska, (Rec. 117). Respondent also testified that all his testimony with reference to quantity of water at petitioner's head gate was based upon the condition of the river in Wyoming at petitioner's head gate and in total disregard of the needs of senior appropriators below petitioner's head gate in Nebraska, stating that his position is based upon the fact that he does not recognize, in his administration, conditions below the state line, (Rec. 117), and that he would not close junior Wyoming diversions to enable any increased supply of water to reach petitioner's head gate as long as water in the amount of 194.6 feet per

second or more was in the river channel at petitioner's head gate, irrespective of whether that water was going down the river channel to satisfy senior demands in Nebraska or not.

R. I. Meeker and R. H. Willis each having an actual personal acquaintance with the North Platte River extending over more than thirty-five years, and each knowing intimately the principle upon which the doctrine of priority is applied, testified that after July 27, 1940, to the end of the irrigation season September 30th, there was no water available at petitioner's head gate to be taken by it in priority order, (Rec. 99), that the reason of the shortage was the taking of water by junior canals above petitioner's head gate in Wyoming, (Rec. 103-4), that petitioner would be either directly or indirectly benefited if the law of priority was enforced, (Rec. 108-109, Rec. 70-71).

The opinion of the Wyoming Supreme Court emphasizes the statement of respondent that to close down junior appropriations above petitioner's point of diversion in Wyoming would not result in an increased flow of more than ten per cent, (Rec. 87). Respondent made such statement; but he also admitted that the volume of water flowing in the channel of the river at petitioner's head gate if junior diversions above in Wyoming were closed would be increased in proportion to the quantity contributed by such closing, less normal transit loss, (Rec. 103).

Witness Meeker testified that the duty of transportation with a wet river channel in the area where petitioner and these juniors divert would not exceed five per cent, that the transportation loss would be negligible, (Rec. 94). The opinion made no mention of Meeker's statement which established normal loss and his statement is not contradicted.

By decree of the District Court of Scotts Bluff County, Nebraska, (Rec. 120), petitioner is enjoined from diverting into its canal any water, when such diversion would deprive a senior appropriator below of water needed and being demanded under an appropriation with priority senior to petitioner's priority. The Wyoming Court found that one of the reasons for the inability of petitioner to obtain water when needed was the direct result of the Nebraska Court Decree. Conclusion of Fact No. 16, (Rec. 37).

Petitioner submits the Nebraska Court Decree is not in the least a justification for the acts and conduct of respondent. The law of priority applies in Nebraska. See Conclusion of Fact No. 19 and State ex rel. Carey v. Cochran, 292 N. W. 239; Enterprise Irrigation District v. Willis, 284 N. W. 326; Farmers Canal Company v. Frank, 100 N. W. 262, and the testimony of Willis, (Rec. 81, Rec. 62), where he states petitioner is always permitted to divert water in priority order, that the Nebraska Court Decree was to enforce and not destroy priority rights.

PRAYER

WHEREFORE, petitioner respectfully submits that a writ of certiorari should be granted herein, that by appropriate order of this Court Wyoming water officials should be required to administer the diversion and taking of appropriated water from the natural channel of the North Platte River for beneficial use in strict order of priority, and that no discrimination should be permitted against petitioner because the land irrigated and for which its appropriation was made and adjudicated lies beyond the boundaries of the State of Wyoming.

Respectfully submitted,

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